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THE POLITICS OF JURISPRUDENCE: LIBERTY AND EQUALITY IN RAWLS AND DWORKIN

STEPHEN C. HICKS*

Law as a general system of rules impartially applied acts as the medium of sovereign governmental order harmonizing the interests of individuals and groups in society as equally and fairly as possible. The individual is free within the rules establishing security and order and is free from law which is not conducive to the general good. Similarly, an individual is free to pursue his own ends if they are compatible with the greatest happiness of the greatest number and also is free not to act on behalf of the common good. While these boundaries are defined by law, the actual social relations within them are the concern of ethics or psychology, not legislation.¹ Thus, political theory as utilitarianism sees the law according to its own representation of the good and its own description of human nature. This is the original coordination of individual society and the body politic in our tradition. Moreover, despite the importance of the twentieth century technological revolution and the transition from the standard of the greatest happiness of the greatest number to that of social welfare, both John Rawls' *Theory of Justice* and Ronald Dworkin's *Taking Rights Seriously* find utilitarianism to be representative enough of prevailing political attitudes to constitute their analytical starting points. Between Blackstone and Austin, however, there occurred a transformation in our way of being in law, which still characterizes the modern world, that both Rawls and Dworkin realize tends to narrow the place of law in our lives, reduce the law of human experience and make

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¹ See J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE*, 118-91 (1965).

politics the only viable context for the determination of the ends of law's usefulness.

Both Dworkin and Rawls address the adjustment of the balance in representative democracy between majority and minority interests. Dworkin's criterion is the relevance of minority goals, Rawls' are the principles of fairness. They deal with the same parts of the balance, namely principles of distribution, as either equal treatment in Dworkin or according to the difference principle in Rawls, and at the other end of the scale, the fundamental right of treatment, as an equal in Dworkin and as liberty in Rawls. Finally, both base their theories on the dignity, respect, and political concern due individuals. But what they mean by each of these parts and the relationships among them is different. Underlying Rawls' theory is an ideal of social rather than political reciprocity, which means that individuals should be free from participation in the choices of the political process that do not operate in favor of the least advantaged representative individual concerned. The effect, therefore, is to reduce or restrain the very role of government—the agent of society acting for the common good. What underlies Dworkin's theory is an ideal of political respect whereby all have an equal voice in the means of choice without necessarily equality of distributed goods.

As a result, one of Dworkin's main arguments is that minorities must have equal political power in some situations. This is readjustment within society according to the principle of equality, but up to the point only of an equal political say, and it rests on a traditional utilitarian concept of social morality, which sees the individual as a rational self-interested ego in a representative capacity and as subject within an objective system of law and order. Rawls' theory, on the other hand, admits readjustment according to equality but only up to the point of a like liberty for all. He argues that when there is liberty, rather an equal political say, we will have a better society. Moreover, this depends on individuals who are moral and disinterested in their social or interpersonal relations so that their concerns for the common good are limited to fairness rather than its maximization at the price of individual, minority, or social liberty. Common to these two approaches is not just their starting point, namely, utilitarianism, but the ethical ideal of respect. I shall try to show how Dworkin's sense of this is more traditional and Rawls' more fundamental, and what this means. Also, I shall try to suggest ways in which Rawls' sense can be more clearly thought of, and then what this shows of our thinking of rights and law generally. It is very significant that our experience of law as well as concept of law is now part of the focus of legal thought. That is, we are seeing law and man as interdependent once again, whether it is the state that is transparent to society through social morality or society that is transparent to individuals through personal morality. This occurs, moreover, at the same time as the alternative forms of social and liberal

democracy and their respective principles of social and political justice are being redefined. Thus the interdependence of law and man widens our perspective of justice to include at least society as well as politics. This is a significant move within the positivistic tradition.

I shall begin with Dworkin's theory because he is more consistent with the whole evolution of the tradition, although his immediate ancestor is probably Mill, for he shares with Mill a concern for the appropriate limits of government rather than the fact or the usefulness of government. Dworkin begins with the observation that there are two senses to "rights," which are a perennial source of confusion. In the weak sense, rights are good for one. In the strong sense, rights defend liberty from governmental interference.² The utilitarian calculation of the greatest good is irrelevant to such strong rights, for the right to disobey is an essential feature of rights against the government, no matter what their political or economic rationale. There is, therefore, no general duty to obey the law because it is conditioned upon respect for these rights. On the other hand, there is no general liberty either, certainly not in the loose sense of license, for what Dworkin means by liberty is the kind of effective independence that is threatened by political inequality and paternalistic legislation.³ He claims, therefore, that rights are fundamental to the coordination of social liberty and political equality, and equality is the fundamental value of the whole system. The two senses of rights mean equal treatment in the distribution of resources and, more importantly, mean the right to treatment as an equal, which is based on equal respect and appears as equal participation in the political decision-making process.⁴ The relationship between the two is such that there arises a right to equal treatment, apart from utilitarian calculations on the best distribution for maximizing the common good, only if that is necessary for treatment as an equal. Otherwise, if there exists treatment as equals, so the strong sense of rights is satisfied, the calculation of the common good democratically represents society's own inviolable concept of justice.⁵

According to Dworkin, the difficulty with the accepted constraint of utilitarianism is that the determination of the common good reflects external preferences that are invariably not based on equal respect.⁶ Thus, rights against the government arise when it effects only external preferences and offends the premise of equal political respect which underlies the basic right to treatment as an equal. Moreover, he claims it is because of the tendency of the will of the majority to override equal respect and

² R. DWORKIN, *TAKING RIGHTS SERIOUSLY*, 188-92 (1977).

³ *Id.* at 263.

⁴ *Id.* at 198-99, 272-73.

⁵ *Id.* at 204-05.

⁶ *Id.* at 276.

treatment as an equal that an individualistic and subjective notion of a right to liberty has gained credence.⁷ Liberty is not fundamental, however, rights are. And equality is prior to liberty, because within existing political organization, freedom is contingent on social ends. This means the equality due a citizen in a representative democracy. That is, a citizen is at least equal before the law, and equal in law in its broadest political sense so as to participate in the determination of the common good.⁸ Therefore, if there is no violation of equal respect or the right to treatment as an equal, equal treatment in the distribution of resources can be altered to effect valid social ends, if the overall result is an increase in residual quality or the balance of effective political power.

This is utilitarianism in reverse. Minorities can impose benefits on society at the price of the majority's external preferences so long as the exercise of minority rights in pursuit of their personal preferences does not violate anyone's rights to treatment as an equal. It represents a modest theory of the redistribution of liberty and equality, for it is neither politically ambitious nor socially inconceivable. Its final aim is the full realization of equality for all minorities in the system. It means, in the context of Dworkin's own particular example, the evolution from a state of being separate but equal, and then equal but separate, into effective equal integration in the actual political process. The question is whether it is a social or an individual process that underlies the realization of treatment as an equal.⁹ Given the utilitarian tradition, however, Dworkin correctly perceives that the political system determines how we see ourselves and how we relate to others. His revolution takes place within its legal theory. The result is an effective increase in the residual equality or participation of the parts of the system without the loss of the majority right to equal political power.¹⁰ This is democracy in action, the law effecting political good. Equality is its guarantee.

The problem with this view is the same one that underlies the whole tradition of utilitarianism which is that either the individual is acknowledged as such at the price of the existence of a real concept of social welfare or the individual is transformed into a citizen to whom rights and liberties are due according to the nature of the political process. Individuals only act in Dworkin's theory as civilly disobedient reminders of the limits to the political use of law; otherwise, man is represented as either the object of law or the subject of the legal system. The whole can only function through officials, classes, or group interests. The parts can only be detached, abstract, and representative. It ought to be noted this is not

⁷ *Id.* at 277.

⁸ *Id.* at 273.

⁹ See Stone, *Justice in the Slough of Equality*, 29 HASTINGS L.J. 995, 1010-15 (1978).

¹⁰ DWORKIN, *supra* note 2, at 239.

only a way of seeing the relationship of man and world, for it is just this political perspective that we use to determine the common good. Dworkin's descriptions are very realistic, as are his prescriptions. In this sense, Dworkin perpetuates the traditional dichotomy between politics and ethics, associating law with politics through their overlap in policy without seeing law as a continuous medium between man and world in which law also overlaps with ethics, not in the policy ends of the use of law, but in the sense of law as a way of social being.

In contrast, it is Rawls' idealism to emphasize the individual as a rational moral agent, not as a represented individual in the political process. That is, he sees the individual from a personal point of view, not from within the subjective-objective polarity of systems and norms. Dworkin's right to treatment as an equal, the fundamental good in political society, is an institutional qualification on the utilitarian calculation of equal treatment. Dworkin's individual is a political subject who adopts an objective public standpoint from which to effect the reflective equilibrium of intuited but sincere convictions and their application to novel and untested situations according to their overall coherence for social morality at the time in question.¹¹ It is thus that the positive legal system reflects values. Therefore, Dworkin looks at the relationship between equality and liberty from the political point of view of rights, because of the priority of equal participation in the political process. He does not look at the relationship from a social point of view, because what he means by human dignity and the respect due individuals has to do not with individual morality but political power, i.e., the means of the use of law.

This narrow sense of equal respect is emphasized furthermore by the fact that if the political choices made are reduced of their external preferences, those which in effect corrupt the utilitarian calculation, personal preferences, are left.¹² Thus, the individual is either represented in the role of citizen, that is, instinctually controlled by impartial rules for the common good, or else as a self-interested being whose reason is subjective unless contained by political society and whose will is self-regarding until represented by political society.

There is a further difficulty with Dworkin's theory in that, although the adjustment of majority preferences by minority interests is certainly based on the right to treatment as an equal in a political sense, equality alone cannot determine the readjustment, for the minority interests themselves have to be evaluated as representative of an increase in the overall common good by minorities themselves. This necessitates values towards

¹¹ *Id.* at 163.

¹² *Id.* at 235, 276.

which equality is the means.¹³ Dworkin recognizes this, for it is his contribution to positivism to superimpose on its facts of social or institutional acceptance arguments of normative political theory, but he does not draw out its individual and social implications, only its political implications.¹⁴ Moreover, not only is equality not fundamental then, or at least the need for it presupposes a range of social values too, but the emphasis on equality, and in particular on an equal say in politics, reduces the possibility of an awareness of emerging values expressing society's basis, cohesion, and direction. This occurs because it renders uniform all interests as political possibilities and generalizes their source in social behavior into an abstract role in the political process.¹⁵ Therefore, as much as Dworkin resolves the inconsistencies of utilitarianism by grounding the rights of minorities on the right to treatment as equals, he still remains within its confines by virtue of his political perspective and the resulting lack of individual or social reciprocity in his theory, except insofar as the individual functions as a citizen and as an object of the law and except as society is represented by the ends of social welfare.

Rawls, on the other hand, does not focus on equality and political respect. He does, however, put the individual at the center of his theory, and he does escape the confines of utilitarianism.¹⁶ In effect, his theory of justice and the principles of fairness it entails present a visionary reversal of the relationship of politics and society. Insofar as contemporary events suggest not only the limited resources of the world, but the delusion of continued material progress, Rawls may have the future on his side. But as much as Dworkin is constrained by reality, Rawls is divorced from it. His approach is to use a theory of the social contract, as distinct from all duty and goal-based theories, in which we idealize the bargaining position into what he calls "the original position," as if we were unaware of our actual social situation or actual assets, so that all our social and political choices would be rational if we acted according to the principles of fairness as they are deduced from the original position.¹⁷

This is not merely a means of setting limits to self-interest or balancing among competing interests. The dictates of reason and the principles of fairness depend on our acting as moral beings in the original position. Rawls allies himself with the distinct tradition of European rationalism.

¹³ See Lucas, *Against Equality*, 40 *PHILOSOPHY* 296 (1965). But see W. KAUFMANN, *WITHOUT GUILT AND JUSTICE* (1973); W.A. LUIJPEN, *PHENOMENOLOGY OF NATURAL LAW* 180, 219 (1967).

¹⁴ DWORKIN, *supra* note 2, at 68.

¹⁵ See Sabine, *The Two Democratic Traditions*, 61 *PHILOSOPHICAL REV.* 451, 471 (1952).

¹⁶ See Sen, *Rawls versus Bentham: An Axiomatic Examination of the Pure Distribution Problem*, in *READING RAWLS* 284 (N. Daniels ed. 1975). Sen argues that Rawls focuses on comparative levels of welfare rather than the utilitarian comparison of individual gains and losses; however, both are necessary for ethical judgment.

¹⁷ J. RAWLS, *A THEORY OF JUSTICE* 21-22 (1971).

The basis for equal distribution, therefore, is social reciprocity, and the basis of reciprocity is the original position, which describes an actual mental attitude as well as a hypothetical contracting situation.¹⁸ Not only does this put liberty before equality and in the perspective of social relationships not political representation, but it also opens up a very suggestive alternative concept of human being to the psychological assumption of rational self-interest and the utilitarian demand of benevolent sympathy. Moreover, it reorients the thinking of law to much that has traditionally been thought improper, but which is also implicit in Dworkin.

There are two principles of fairness.¹⁹ The first is that each individual is entitled to the most extensive liberty or primary goods compatible with a like liberty for all. The second is that social and economic inequalities are arbitrary unless they work to the advantage of all according to the principle of maximizing the primary goods of the least advantaged.²⁰ Liberty is prior in that the primary good, which includes the rights to vote and be eligible for office, the rights of speech, assembly, and conscience, and the right to hold property and be free from unwarranted intrusion, can only be sacrificed for liberty and not greater social gains of opportunity, power, income or wealth.²¹ As a result, there is no need for standards of rational choice. Majority desires do not form the basis of any given liberty, because it is on the basis of liberty and within the principles of fairness that the majority represents social welfare. Also, there is no need for comparison of personal interests, because, in the original position, self-interest regarding the secondary goods has been blocked out.²² The respect for others, therefore, is not just due them as equal participants in the political system but recognizes all individuals initially as merely responsible for their own life-plans in a system of social reciprocity based on mutual disinterestedness in everything except liberty and the standard of living of the least advantaged.²³ The difficulty with this is whether people can think this way.

The utilitarian maximization of social welfare would continue but subject to the priority of liberty, the principles of fairness and the threshold criterion of its effect on the least advantaged. Progress in social welfare is made by lining up our intuitions, convictions, and knowledge in reflective equilibrium but always according to the principle of fairness.²⁴ Individual self-interest is recognized in the right to pursue one's own life-

¹⁸ *Id.* at 14; DWORKIN *supra* note 2, at 158.

¹⁹ See RAWLS, *supra* note 17, at 60, 302. For a discussion of fairness as the "rising minimum argument," see Lucas, *supra* note 13, at 302-03.

²⁰ RAWLS, *supra* note 17, at 302-03.

²¹ *Id.* at 61, 243-45.

²² *Id.* at 91-2, 447, 450.

²³ *Id.* at 511, 543.

²⁴ *Id.* at 20, 48-53.

plan and to veto choices that are incompatible with liberty. The coordination of political authority and the body politic, therefore, is achieved by the mediation of social reciprocity, and the tension between the individual and the state is resolved by impartiality or mutual disinterestedness towards social welfare, subject to the moral and rational principles of fairness based on both equal political respect and mutual social respect.²⁵ The difficulty with this is whether it is actually compatible with traditional jurisprudence.

On the one hand, the individual is fulfilled primarily by social reciprocity and is represented by political participation, while, on the other hand, the individual appears as an atemporal and immaterial being in the original who must abstract from his own facticity to apply the principles of fairness to choices.²⁶ It is like a pure theory of custom. Rawls' individual is certainly not interpersonal, self-subsumed in an altruistic majority, nor a detached sympathetic observer reaching political decisions as if on another's behalf.²⁷ Utilitarianism's individual is self-interested, and its mutuality is achieved by the process of representation. Rawls' individual is reciprocal and mutuality is achieved by moral being. We are confronted by our own social responsibility as individuals, not our political power.²⁸ Even so, making decisions in the original position is very hard to imagine. It is not the demand of being moral that is hard to realize but the pure forgetfulness of how things are and the posture of detachment from ourselves that are the guarantees of this original fairness.

To necessitate the reduction of interests based on one's existing assets, social situation, and resulting possibilities, which are the facts of human existence given to us, is as ideal an expectation and unreal a description of human nature as is utilitarianism's reliance on altruism or sympathy.²⁹ The difference, of course, is that it represents a meaningful ethical injunction and not a scientific principle of human nature. It purports to tell us how to be and not just that we are in fact motivated by pleasure and pain. Respect to Rawls is more than equal political power and actual social respect; it is also a personal and mutual condition of our being. Even so, this may necessitate at least one utilitarian calculation, namely, whether the personal advantages of the exercise of some liberty are outweighed by disadvantages in the general distribution of that liberty. It also raises the

²⁵ *Id.* at 14, 33, 499-502.

²⁶ See R. WOLFF, *UNDERSTANDING RAWLS* 97 (1977). Wolff offers criticism of the position taken by Rawls.

²⁷ RAWLS, *supra* note 17, at 135, 184-88.

²⁸ *Id.* at 187-92, 256.

²⁹ Moreover, unlike the eighteenth century history of charity which no doubt inspired nineteenth century altruism, we do not have a recent history of moral behavior to draw upon. See generally Woodward, *Reality and Social Reform: The Transition from Laissez faire to the Welfare State*, 72 *YALE L.J.* 286, 300 (1962).

question whether there exists liberty as such, or only particular liberties, and whether liberty as such can be quantitatively measured without some a priori standard of interpersonal happiness.³⁰

These are real difficulties in Rawls' theory. Their source is in the detached nature of reasoning in the original position, for, although it is not a hypothetical or logical step in Rawls' argument, as a real act or state of mind it is questionable to what extent reason can leave the existential situation of the reasoning individual. But mutual respect in the form of the principles of fairness and the disinterestedness that underlies them is more realistic than the compromise asked of us politically between self-interest and sympathy. Social reciprocity is more feasible than political equilibrium because individuals naturally act interpersonally not representatively. Conversely, a political balance of power and treatment as equals in the system is less feasible than social respect because of the impact of economic and moral crises upon the political system. Conflicting interests are effectively resolved by society, just as their demands originate in society. From this point of view, it is the political system that is the abstraction. What this means is that Rawls appropriately opens up the individual rather than the political dimension of social morality, as we think of it in our jurisprudential tradition, even though his own concept of the individual is abstract and idealistic. Man as rational subject is the other extreme to man as object of positive law.

Rawls' significance is that he stakes out a place in the debate on the future of democracy and presents a theory quite independent of utilitarian class or perfectionist theories of organization.³¹ It may be true that as material wants become satisfied, given security and order, liberty becomes more prized, because the personal fulfillment of realizing one's life-plan is possible. If so, then, as Rawls himself notes, his theory accurately reflects the tendency of justice to balance principles of the equal distribution of goods with liberty.³² On the one hand, Rawls intends to retain the individualistic emphasis lost in majoritarian politics and on the other admit the autonomy of individual preferences vis-a-vis the form of politics. Not only is the individual central but the individual acts qua individual, not in a representative capacity or as represented by social welfare.³³ This grants Rawls the actuality of the original position. But more importantly, it emphasizes the social context of mutual respect for both political equality and the distribution of resources, as opposed to self-interest, altruism, or social

³⁰ WOLFF, *supra* note 26, at 90; Hart, *Rawls on Liberty and its Priority*, in *READING RAWLS* 230, 238, 248 (N. Daniels ed. 1975).

³¹ See DWORKIN, *supra* note 2, at 182.

³² RAWLS, *supra* note 17, at 542, 546.

³³ It has been suggested that Rawls has no theory regarding the state. WOLFF, *supra* note 26, at 202. For a discussion of the implications of the social contract in this regard, see Sabine, *supra* note 15, at 450.

engineering. The question is how we are to come to think from the original position, or what is the same thing, to see ourselves as moral beings, and whether this is not just another way for the self to represent itself rather than be itself.

To summarize, Dworkin's two principles are the equal treatment of all in the distribution of actual social goods and the treatment as an equal in participation in the political process. Rawls' two principles are principles of distribution according to maximizing the index of primary goods of the least advantaged representative person or not maximizing at all, which depends upon the most extensive social and political liberty compatible with a like liberty for all. The principle underlying Dworkin's principles is equality, and the relationship between the two is a form of utilitarianism in reverse. That is, the strong sense of the right to treatment as an equal qualifies the normal operation of utilitarianism in favor of minorities. The principle underlying Rawls' principles of fairness is respect and the relationship between the two principles reverses our usual thinking. It restrains maximization of goods, unless distribution can act in favor of the least advantaged, or else it uses all increases in goods, first to equalize liberty and then to restrain their maximization. In the interim, engineering a welfare state or social democracy would be inevitable. But this is not, I submit, Rawls' political credo. His political philosophy is a kind of conservatism or liberal individualism.

Secondly, Dworkin makes the connection between the political dignity due each individual as a citizen and the individual in an existential situation by way of the constructive coherence of novel decisions for existing social morality. In this, he places a traditional emphasis on the system and its officials, particularly the judge. Individuals themselves judge similarly or, phrased differently, according to the coherence of their maxims of action for social morality. Rawls makes the connection by way of the process of reflective equilibrium of the average representative citizen, not by way of officials within the system emphasizing his individual perspective. Moreover, the individual acts, not according to personal preferences and external preferences contained by overall social coherence, but according to personal self-respect in the pursuit of individual life-plans and mutual disinterest as regards all else, subject to the principles of fairness.

The history of utilitarianism, and the contemporary answers to it, suggests that the transition from the minimal role of state maintenance of order and security to that of maximizing social welfare brings with it a certain risk. This risk is, as Hart put it in *The Concept of Law*, that the change from primary rules to a system of both primary and secondary rules gives rise to the possibility that authority may act in disregard of those

whose support it can do without.³⁴ But not only does this mean a systematic political encroachment on original social independence as the very price of real and useful law, i.e., willed rather than discovered, but it also creates the risk of paternalism eroding self-respect and the tyranny of the majority unequally distributing secondary goods. Once the risk is assumed though, to maximize welfare and to maintain order, the need for redistribution of goods, rationing of resources and protection of fundamental rights is inevitable because there is created a device independent of society, through which society is represented to itself. This body politic continually threatens imbalance, repression, and exploitation, as it generates welfare, not to mention a distortion of needs and wants. Both Rawls and Dworkin recognize the demand for its readjustment, as either a matter of fairness, by way of moral behavior, or of relevant social goals, by way of the political equality of minorities. Both also base their ideals and principles of readjustment on the premise of respect. For Rawls, this has the wider social sense of mutual respect, while for Dworkin, it has the narrower sense of equal political respect.

It is not equality, therefore, that is fundamental, nor even shared by both thinkers. In the determination of relevant social goods for the readjustment of minority interests, values other than equality must be drawn upon. Moreover, the substance of Rawls' liberty must mean more than an equal say in decision-making, partially because this freedom is the price political government must pay individuals, as Dworkin's own strong right to treatment as an equal is also. More importantly, liberty means more, because its priority reverses the emphasis on society's representation of itself and puts politics, as the means of the distribution of goods so as to maximize welfare, back into its social setting. From the point of view of law, therefore, Dworkin's concept of equal respect presupposes our mutuality. We are social beings in the world before our security and welfare are ordered on our behalf. Rawls' concept of fairness is closer to the way we are in the world, even though Dworkin actually represents the facts, because Rawls evokes what binds us together and not how we stand towards each other. Even as political equals, not only must we respect but that respect must be a manifestation of some kind of reciprocity.

Furthermore, we tend to think of equality as a mathematical standard of assured fairness and automatic application. It conforms to our expectations of purity, simplicity, and rational clarity. In this we are deceived for two reasons. Equality itself necessitates a standard of choice or a perspective from which to judge what is to be considered, for it is apparent that at first sight nothing is equal to anything else. Just as rights are only means to the ends of liberty and equality, so is equality an abstract form of

³⁴ H.L.A. HART, *THE CONCEPT OF LAW* 159 (1961). See also Berlin, *Equality*, 56 P.A.S. 300, 318 (1956).

liberty. We must know what we value before we determine equality. Secondly, equality as a criterion of proportionate division, that is, according to some policy of the relationship of parts to each other and to the whole, tends to result in equality of power only and not equality of wealth, income, status, or opportunity. As a result, each interlocking dependent part of the whole may have equal political power and can withdraw its support and hold the rest to ransom, just as any sovereign can coerce a minority. But there is no security in this nor certain social values to guide the balance of power.³⁵ Moreover, in the face of such equal power, equality as a measure of justice is quite equivocal. The more redistribution is necessary, the less equality determines the choices and the more other values come into play. Such values are derived not from the political system but indirectly from society. Equality, therefore, as the proportionate distribution of goods, is to be seen against the background of liberty, that is, how we stand toward law. Further, equality, as equal respect in the formation of political processes, is dependent upon social reciprocity, as a way of being in law.

Of course, the difficulty with this is that it subverts the whole tradition beginning not only with Bentham and Austin, but going as far back as Hobbes. It has always appeared that man in society lacked any self-regulating standards and that rules impartially applied and derived from the public source of authority were the rational means to the ends of order and security. As a result, law has to be coercive not only for efficiency but for the control of the subjective and egocentric passions by objective reason. The law is expressed in the form of uniform and general rules. The source of the expression of such law is not yet society, less individuals whose subjectivity, desires, and values cannot be empirically demonstrated, but is a representative and sovereign, whose impersonality and impartiality guarantee objectivity in the calculation of the common good. That this is so explains the persuasiveness of Dworkin's qualifications to utilitarianism. But as much as the tradition has focused on rules and systems or their norms and officials, or on the representation of social morality as social welfare, there is a fundamental distortion of the way we are in law and the world, by virtue of the overemphasis on policy, or of the overlap of law and politics, to the exclusion of ethics. Prior to being objects of rules, subjects of a system, or represented by social welfare, man is, and was to Blackstone, for example, in a perfectionist sense, a social being in law.³⁶ It is this overlap of law and ethics that we have lost sight of and towards which both Rawls and Dworkin lead us with their different senses of equal, self, and mutual respect, the one by moral rationalism and the other by rational jurisprudence.

³⁵ It is significant that the effectiveness of a positive legal system depends on the voluntary acceptance of coercive law by its officials and a majority. HART, *supra* note 34, at 196.

³⁶ D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF LAW* (1973).

The implications of this for our modern theory of law are profound since it was Bentham's reformulation of the meaning of law that gave our tradition its opportunity to reform society and maximize the common welfare, and which provides the starting point for both Rawls and Dworkin. Modern legal theory, with its representation of law as a system of rules, policy science, or processes of dispute resolution, distorts the meaning of law for human existence, not only by presenting law only in its political or official appearance, but by separating it from values and interests except as a means to ends so that, even at its most concrete, law rests upon society only as a political abstraction. Its weakness, according to Dworkin, is its externality regarding preferences. In the modern world there is more and more law, therefore, because its essence as a tool of politics is its usefulness in effecting policy, but there is no more lawfulness because we have lost sight of its presence in our lives as a way of being, rooted in social reciprocity. But equal political respect, or treatment as an equal, as a guarantee of social morality itself, has a weakness in that the very usefulness of law for creating security and welfare depends upon an existing reciprocity. Rawls would claim this is a matter of individual responsibility. On the one hand, therefore, it is necessary to consider the origins of our tradition and its effects on our experience of law, for this will show how we have come to associate law with politics, and on the other hand, we must consider what reciprocity means for our jurisprudential tradition.

It is not a question of human rights. The question of human rights against the state was subsumed in our technologically advanced western societies into the two fundamental questions of welfare and security, once a certain level of political authority, economic stability, and democratic participation had been reached. This is because the very sense of right was transformed by the nature of the state itself as an economic, social, and moral agent of man. Rights became human and rational, not divine or customary. As a result, in our broad historical common-law tradition, they are either individualistic conditions of our very humanity, i.e., ideal or natural, or they are granted by the state against itself, i.e., for particular political ends. Both of these extremes obscure the real origin of rights in human society, as opposed to the individual or the body politic, which are the objective and subjective poles to our thinking today. Therefore, the role of rights in law has to be seen against the background of their meaning in society and of law as natural and divine, rather than useful and political, or rather, as a way of being.

From that point of view of the individual, human rights are particular demands for something to be granted, protected, or left alone. From the point of view of the state, human rights are the very principles of political organization. The whole functions according to choices effected within an evolving but established political order. The concept of a right, therefore,

is more an axis around which other individual, social, or political values revolve, than it is something in itself. In itself, a right is the essential tool of law viewed ambiguously as human and yet external, as our tradition tends to represent it. However, this distorts both the source of law and the ends towards which it tends. We think of "rights" because of this polarization in our thinking between man and state. Thinking of rights represents our modern way of dealing with political reality but obscures its own meaning in the context of society's values. In this way, Dworkin's emphasis on the basic right to treatment as an equal is consistent with the facts but limited in its conception of social morality, except as a source of equal political say.

The values that modern legal theory has focused upon, from the subjective point of view of individual experience and choices and from the objective point of view of the state, are liberty and equality. They are either inalienable by or from the individual, as human rights, or they exist only by virtue of the state ordering a compromise balance of interests, as rights to welfare and security. In effect, therefore, liberty and equality represent the configuration of the Good as it has unfolded in the western metaphysical tradition through the traditions of rationalism and utilitarianism.³⁷ Rights are one of the various forms of the mediation of this unfolding in the modern world as it takes place through our perspectives of the relationship of law to morals, the source of legal obligation, and the meaning of justice.³⁸ In other words, the tension between majority and minority, individual and state, law and nature provide the framework for the recent historical working out of liberty and equality, and liberty and equality define an area of contemporary reality as seen from the point of view of jurisprudence. In this way, jurisprudence offers a basic reflection of the human condition. In American society, this concerns, for example, reverse discrimination, price, wage and energy controls, the morality of abortion and homosexuality, and generally, the alternative role of government in social or liberal democracy. What is being examined, however, is the legal structure of society and the place of politics in its maintenance, and what this implies is an emerging awareness of the inherent weakness in the moral basis of the form of our organization. In the whole superstructure of contemporary reality there appears little that is rooted in personal morality, and there is much evidence of the autonomy of politics from society. I suggest this is in part because of the law's narrowing of human dignity to mean equal political power.

Liberty and equality are similar in that they both rest on ideas of respect. They are different in that liberty tends towards reciprocity whereas equality tends towards relationship. Thus, the representation of

³⁷ See M. HEIDEGGER, *AN INTRODUCTION TO METAPHYSICS*, 164-72 (1959).

³⁸ I offer these as the defining problems of modern legal theory.

intended relative or distributive equality is participation in the political process where decisions about choices and values are made, whereas the intended mutual respect of liberty is represented by fairness in the very ends of the political process itself and not just equality of representation within it.³⁹

In the role of a citizen, therefore, man is necessarily also a human being, but the reverse is not necessarily true. As a citizen, man is an object to himself and the system. The thinking that underlies equality, therefore, concerns proportion as between parts according to the whole as determined politically, whereas the thinking that underlies liberty concerns reciprocity among the parts, which is a matter of imminent balance and symmetry within society rather than ordered externally. The latter forms the background against which the former stands out, because the body politic or the modern state in effect, through which principles of proportionate distributive equality function, is a historical and organizational refinement of civil society; that is, equal respect stands out against the background of mutual respect.

Once law has become the expression of sovereign will, such ideals as finding one's place in the divine scheme of things or the virtue of acting according to a universal principle of justice are seen only as moral or religious and therefore extra-legal. The form of society disappears as the extremes of man and state appear in the front of our concerns. The good of society as a whole is resolved and bettered, of course, within the intimate relationship of liberty and equality, because of the representation of society in the form of the greatest happiness of the greatest number and of the individual as motivated by pleasure or pain. This insight is responsible for much of modern progress. Because we see ourselves as subjective but rational, however, liberty and equality appear to be the given form of the state, and because we think in a utilitarian way and use the law as a tool, rights appear to be the means to the end of equality. Thus, although society forms the background to politics, we look at everything from a political perspective and hence from the importance of equality and the obscurity of liberty. But Dworkin's idea of equal respect also opens up the possibility of developing an individualistic sense of social morality and thereby broadens the foundation of positive law. Rawls' principles of liberty suggest one form this may take.

In the development of this tradition, equality at first remained implicit in the immediate ends of security or actual order until a certain minimum level of abundance and opportunity had been created. It was then that human rights made feasible an equal distribution of welfare and

³⁹ Dworkin likens his own sense of equal respect in the design and administration of political institutions to Rawls' concept of respect. DWORKIN, *supra* note 2 at 180. This is surely an error of admiration.

liberty, as social being in divine or customary law was eclipsed. What was worked out initially, however, was the coordination of the realms of individual freedom and the good of society, rather than the scope of the political authority with regard to the good. Thus, liberty was an aspect of society and not preempted by the form of political organization. But as political society became defined more narrowly, formally, and exclusively, and became the essential structure of society itself, the nature of liberty was taken for granted as political reality, and the focus shifted to the problem of equality of participation in the creation of that essential structure. This is why the original sense of liberty for the tradition needs uncovering again and why Rawls' opening up of Dworkin's sense of social morality to the individual is so significant.

This can be described in three jurisprudential stages. Liberty has changed from being the natural residue of both rights given by the law for the common good and the pre-existing social background of law as custom onto which is grafted legislative enactments and through which rules are made.⁴⁰ To Blackstone, liberty was personal and social, although not fair or equal. Liberty in this sense of pre-existing the liberty given by law seems to us wishful and irrational thinking, so ingrained is our political perspective and thinking of rights and equality. From the point of view of law as the expression of sovereign will, rights are merely the creation of law. They result from acts prohibiting or ordering behavior.⁴¹ Duties were the empirically verifiable entities of the law for Bentham, and since the law orders, it may, although need not, act to determine all behavior. As given by law, including permissive as well as coercive laws, liberty means, obviously, the freedom to be happy and to be free from restraints on happiness, insofar as is compatible with the common welfare.⁴²

The emphasis has shifted so far from the nature of liberty and equality in society to their political possibilities through the creation of rights and duties because of a revolution in the nature of law and its usefulness for what are the basic ends of security and welfare. Liberty is no longer natural to law and order but exists as formally created by the political use of the law for the ends of the security and welfare of society. Of course what is natural to society, so history suggests, is neither liberal nor equal, but to a great extent progress must be built upon the past. Even so, society remains the counterbalance to whatever swings of the pendulum politics itself causes. It is therefore appropriate to put law back into society and consider what liberty and equality may be natural to our present social

⁴⁰ See W. BLACKSTONE, COMMENTARIES 125-6.

⁴¹ See J. BENTHAM, OF LAWS IN GENERAL, 294 (H.L.A. Hart ed. 1970); BENTHAM'S POLITICAL THOUGHT 257-90 (B. Parekh ed. 1973).

⁴² See generally BENTHAM'S POLITICAL THOUGHT, *supra* note 40, at 279. See also Lyons, *Logic and Coercion in Bentham's Theory of Law*, 57 CORNELL L. REV. 335 (1972).

being. Without a social perspective, we experience law as an external given in various ways, not also a way of being. What this means is that the way we shape our being in law must be an individual and social, as well as a political process of ordering.

The stage is set for modern thinking, however, when liberty is no longer the concern of proper law or of the art of legislation but a matter of ethics, the realm of action where one is free from coercion for the common welfare.⁴³ The relations that Austin is concerned with are those between the sovereign and the body politic, not between individuals or individuals and the social good.⁴⁴ Because law is essentially coercive, willed, and external, it is something within which man is ordered. Law is not diffuse throughout, being in a social and customary sense, nor is it something ambiguously moral, religious, and political. It is given that order consists of a balance of liberty and equality as maintained by the state. Austin's concept of law is very clear. It effects the common good and appeals to our interests. Progress in the world in the nineteenth and twentieth centuries cannot be denied; it is a matter only of what is changed in society by representing it politically as the object of the use of law for social welfare.

In effect the nature of our respect describes our way of being in law. Either we can be politically equal or socially fair, as Dworkin and Rawls frame the alternatives. The realization of this is like Rawls' thinking in the original position but turns upon uncovering what sense of law lies sedimented beneath its traditional concepts, rather than bracketing out the real world.⁴⁵ Morality is not just an individual way of being, nor the way of politics; it is essentially social. Likewise, law is not wholly objective any more than it is subjective. It is an aspect of our social being. Psychologically, therefore, we are not only the objects of law as self-interested or altruistic subjects in representative roles, as utilitarianism realizes, but we are also mutually disinterested and reciprocally related. Similarly, as a way of being, law is not just willed, positive, and useful; it reflects the way we are.

Reciprocity is the public dimension to this way of being in law, not just in the participation in political decisions as equals but in a social sense too as an aspect of our participation in our shared form of life.⁴⁶ The private side of this is respect which is not self-respect but which is the whole realm of mutual disinterestedness. Respect is impartial to individuals, differentiating one from another. Liberty, therefore, is not egotistical license or political autonomy. It is that respect and reciprocity which ex-

⁴³ See AUSTIN, *supra* note 1, at 107.

⁴⁴ *Id.* at 291-3.

⁴⁵ It is submitted that this resembles phenomenological archeology. See generally M. FOUCAULT, *THE ORDER OF THINGS* (1973).

⁴⁶ See PITKIN, WITTGENSTEIN AND JUSTICE 132-9 (1972).

ists in our world. Prior to proportionate distribution and equality of treatment is this common bond of mutuality which is not calculated according to an external principle of welfare by the body politic but is society's imminent balance as reflected by law. It is this that must be the concern of legal theory henceforth, that is, not what law is but how we stand towards law; not what it is to be used for but whether it is to be used. What is private and public in society, therefore, is not the public realm of politics or the private realm of the individual. The private and public are balanced in fairness and equality when we respect privately and reciprocate publically. Likewise, this is not the proportionate distribution of equal liberty and welfare nor the line between individualized rights and externalized law. It is law as a way of being.

This speculation represents the authentication of legal realism for the process is in us, not in a system. It transcends positivism for the given reality of willed law is only a part of the whole. Society is a human product. We make it what it is and are responsible for it, even our representation of it through politics.⁴⁷ But our representation of our way of being in law, that is, as object of a system, removes from us the responsibility of reciprocity and of respect. As much as law is an external concept and an act of representative will useful for chosen ends we do think of the existing state of affairs as the law's responsibility or as the fault of our representatives and not as a matter of the very nature of political society. Law is uprooted from man's being, because we turn to it for its usefulness, but we do not also see it in ourselves.

Lastly, this represents, I believe, another renaissance in natural law, historically and logically in keeping with that of the late eighteenth century, for the egocentricity of individualism as the very ground of reason, as it appeared in the pleasure-pain principle of Benthamism, is now seen to be grounded in our way of being in the world with others.⁴⁸ Perhaps, in fact, we respond to respect and reciprocity. If so, we must uncover what unites us socially as well as politically. What is more natural today than respect and reciprocity given the moral and economic crises facing politics? Our sense of the political, therefore, must at least be seen against the background of the social, and what may be unnatural in the long run is our expectation that liberty and equality can be arranged and ordered by policies. The ethics to face up to in the future may lie, therefore, in interpersonal values as represented by society, not social values as represented by political society. But political society is a given. It is not questioned at its basis by law. Rawls' and Dworkin's emphases on equal and mutual respect, however, are clear signals that our thinking of law is moving into the exploration of new possibilities in which its existential and phenome-

⁴⁷ P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 79 (1971).

⁴⁸ D. YANKELOVICH & W. BARRETT, *EGO AND INSTINCT* 269 (1970).

nological foundations may be laid bare. The significance of this obviously will ultimately be felt in the relationship between liberty and equality and in the inbetween of man and law, in its original sense of a path or way and in something like a metaphysics of legal experience.

What this means jurisprudentially is, as Dworkin appreciates, a theory of the person in law.⁴⁹ Of course, as much as law is not mine or wholly subjective it must be objective. Yet law is not wholly other to the individual. The ultimate forms of this today are the state and experience. Modern legal theory represents this as a positive system of rules or a realistic process of dispute resolution. However, we experience law as a way of being in the world as well as the objective structure of order and the subjective means of its redress. A classical example of such a complete concept of law can be found in the system of St. Thomas Aquinas. Our modern thinking of law, however, has hitherto obscured much of the meaningfulness of divine, natural, and human law for the sake of the usefulness of positive law.⁵⁰ It is Dworkin's significance to open up our tradition of positive law to its basis in social morality. It is Rawls' significance to present us with a reason for being individually moral.

⁴⁹ DWORKIN, *supra* note 2.

⁵⁰ It is worth noting the significant discussion of participation and its relevance to intersubjectivity by Pope John Paul II. K. WOJTYLA, *THE ACTING PERSON*, 261 (1979).